ON TRACK WITH MDT

Over the past year, MDT has been working to ensure compliance with the statutes enacted during the 2003 legislative session.

One piece of legislation, *MCA 28-2-2111 Construction contract indemnification provisions*, has created a lot of discussion because it does not apply to MDT or any state agency. However, I believe, and the Transportation Commission has agreed, that as an agency MDT should amend our contracts to unilaterally implement changes that consider both the spirit and the letter of the law.

Please let me explain. On a national basis, the claim from business (including the construction industry) is that indemnification insurance costs have increased since 9/11, threatening to put some smaller contractors out of business because of difficulty in obtaining competitive quotes. Based on these claims, we amended our contract provisions in January to address the issues raised by *MCA 28-2-2111*.

So just what does *MCA 28-2-2111* do? It makes the broad indemnification language for contractors' insurance requirements in certain public construction contracts no longer permissible, saying such language is "void as against the public policy of this state" (*MCA 28-2-2111*).

The statute goes on to say:

> (2) A construction contract may contain a provision:
>
> (a) requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party or the indemnifying party's officers, employees, or agents; or
>
> (b) requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.

To put it simply, prior to the January letting, MDT's contract insurance requirements (Provisions, Section IV) required the prime contractor to purchase a broad indemnification policy that protected MDT from all liability on the project. In the new provisions, that language has been changed to require the contractor to purchase an owner's protective liability insurance policy on behalf of the owner, MDT. That policy must have "a general aggregate limit of not less than two million dollars and an occurrence limit of not less than one million dollars, to be kept in full force until the

project is accepted by the Commission." That policy is in addition to the policy already required by the department's specifications (section 107.13).

The intent of this change is to require the contractor to purchase affordable insurance protection, including protection of the owner (the state of Montana). In essence, the protection afforded the state is having our own insurance policy purchased by the contractor rather than the contractor's insurer indemnifying the state. Theoretically, in matters other than project safety, which remains the responsibility of the prime contractor, each party will now be liable for its own negligence, whereas before the contractor bore all responsibility unless there was a problem/damage that was solely the result of the negligence of MDT.

As we move forward, we'll test the effect of this change when damage claims against a project occur.

I believe making this change is key to staying "on track," both with the laws of this great state and with the needs of our contracting community.

Please drive safely.

Dave Galt
Director